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NONPROFIT ORGANIZATIONS
ALERT

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Doing Good While Doing Well — Delaware Is the 19th State to Adopt Public Benefit Corporation Law

By Cynthia G. Fischer and Sekou Lewis

A new Delaware law authorizing the creation of public benefit corporations ("PBCs") in Delaware becomes effective on August 1, 2013. PBCs are a new type of socially conscious for-profit corporation intended to operate in a responsible and sustainable manner. While PBCs operate on a for-profit basis and pay income taxes, they are unique in that they are managed in a manner that balances the pecuniary interests of its stockholders with persons, entities or communities that are materially affected by the corporation's conduct. Delaware is the 19th state to adopt such legislation.

Businesses that elect public benefit corporation status in Delaware will receive the stability, efficiency and predictability of Delaware law, as well as a way to differentiate their business and transparently report on their social and environmental performance.

PBCs will have most of the characteristics of a traditional Delaware business corporation, but will be subject to new requirements with respect to purpose, accountability and transparency:

- *Purpose.* The PBC must have a specific purpose of creating a material positive effect (or reduction of negative effects) on society and the environment.
- *Accountability.* When making decisions, directors have a duty to balance profit, people and planet.
- *Transparency.* The PBC must report biannually to the public the company's social and environmental performance of the special purpose(s) identified in its certificate of incorporation.

Public Benefit

An entity that elects to be a PBC must, within its certificate of incorporation, identify one or more specific public benefits to be promoted by the corporation. "Public Benefit" means "a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature." In addition to identifying a specific public benefit, a corporation must generally operate the business in a responsible and sustainable manner.

Accountability — Extended Standards and Duties of Directors

Directors will be required to manage the corporation in a manner that balances: (i) the stockholders' pecuniary interests, (ii) the best interests of those materially affected by the corporation's conduct; and (iii) the specific public benefit(s) identified in its certificate of incorporation.

Directors will not, however, by virtue of being a PBC, have a duty to third-party beneficiaries of the public benefit(s) identified in the PBC's certificate of incorporation.

With respect to decisions implicating the three-part balancing requirement, directors will be deemed to have satisfied their fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.

The certificate of incorporation of a PBC may include a provision that any disinterested failure to satisfy the extended duties as a PBC, will not constitute an act or omission not in good faith, or a breach of the duty of loyalty.

Only stockholders owning two percent of the outstanding shares of a PBC or, in the case of a PBC with shares listed on a national securities exchange, the lesser of two percent or shares of at least $2 million dollars in market value, can bring a derivative lawsuit to enforce the duties and requirements of directors of a PBC.

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Transparency and Reporting

At least every two years, a PBC must provide reports to its stockholders about the corporation's promotion of the public benefit(s) identified in the certificate of incorporation and the interests of those materially affected by the corporation's conduct (i.e., its stockholders). The report must include:

- The objectives the board of directors has established to promote such public benefit or public benefits and interests.
- The standards the board of directors has adopted to measure the corporation's progress in promoting such public benefit or public benefits and interests.
- Objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such public benefit or public benefits and interests.
- An assessment of the corporation's success in meeting the objectives and promoting such public benefit or public benefits and interests.

In addition to the reporting obligations above, the corporation may elect to meet a higher transparency standard by: (i) providing more frequent reports than every two years; (ii) making the reports available to the public; and/or (iii) using a third-party reporting standard or attaining a periodic third-party certification addressing the corporation's promotion of the public benefit(s) identified in the certificate of incorporation.

Becoming a Benefit Corporation

A PBC is formed in the same manner as any other corporation formed under the Delaware General Corporation Law. A corporation can become a PBC by including in its certificate of incorporation one or more specific public benefits that the corporation chooses to promote. Additionally, the name of the corporation must contain the words "public benefit corporation" or the abbreviation "P.B.C." or "PBC."

An existing corporation can become a public benefit corporation by either (i) amending its certificate of incorporation to include the specific public benefit purpose and changing its name to include the required words, or (ii) merging or consolidating where the new or resulting corporation is a PBC. Either action requires approval by 90 percent of the outstanding shares of the corporation. The new law also grants appraisal rights to any dissenting stockholders that do not vote in favor of the amendment, merger or consolidation. Nonprofit corporations may not merge with or consolidate into any public benefit corporation. ◆

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